MISCELLANY.

Missouri Officer Does His Duty and Gets Fired.—Missouri, long accustomed to government by political reward and its consequent audacities, just now is aghast at the most recent manifestation of office-holding brass. It has supinely watched administration of public welfare according to the whim of its servants until it expects little better.

But now comes an officeholder who has calmly tossed a state law reading clear as a primer into the discard on the ground that its enforcement violates "office policy."

The state has a statute that forbids sale of the plumage of any but game birds. The law was the reflection of the public repugnance that arose a few years ago against the custom of women to display the feathers and bodies of birds on their hats. The law has rested quiescent because public sentiment reformed fashion and women who unfeelingly and with no twinge of conscience had carted about the carcasses of sacrificed songsters, sought other foibles when fashion wrote *passé*. But reaction has set in. As they have sipped more frequently of cocktails in resentment to prohibition's "no," so now many have begun to cherish anew birds of paradise and aigrettes when they are told that they must not.

Encouraging this sly contempt of the law, St. Louis department stores recently have been exhibiting birds of paradise, and milady, glorying in perversity, has paid large sums for them. They again have come to wear the birds.

A humble deputy, with an amazing fidelity to his job, noted the reappearance of the forbidden birds and sought the source of supply. When he had found it, he seized all the birds, notified his superior, the State Game and Fish Commissioner, and went home to sleep in the consciousness of duty performed.

When he woke next morning he found that he had been "fired."

The State Food and Drug Commissioner told him that the law was not meant to be enforced and that he would not enforce it and would not brook enforcement by any of his subordinates. He ordered the birds restored to the department owners. But a deputy who had spunk to arrest large department-store owners could not be expected to bow thus meekly. He refused to return the birds.

Thereupon feathers began to fly, while the state interestedly looked on to learn if this was to be its emancipation from government by office-rule rather than statute.

The deputy is John P. Heller, of St. Louis. The stores in which he seized the feathers included the two largest department stores in the city—Scruggs, Vandervoort & Barney, in which he found two plumes valued at $125, and Stix, Baer & Fuller Dry Goods Company, in which he confiscated five plumes valued at $318. Other stores were Sonnenfeld's, four plumes valued at $214.50; Kline's one plume valued at $65, and Bedell's, one plume valued at $124. The penalty

for sale of prohibited feathers is $25 and $5 additional for each bird, a part of whose feathers are offered.

Heller was accompanied on his visits to the stores by United States Game Warden Barmeier, of St. Louis. Possession of birds of paradise is a presumption of violation of a United States act which forbids their importation. The birds do not exist in the United States.

When Heller heard from his chief, it was in the following language: "My position is this. If Mr. Barmeier did not see fit to seize the plumes under Federal regulations, it ill behooves our department to bull the market and attempt to prosecute in the name of the state. We are in possession of a ruling from the Federal Government to the effect that it will not prosecute in these cases. If it finds itself unable successfully to prosecute, we feel that we would simply be causing trouble to try to do so."

Deputy Heller replied that he didn't give a tinker's darn what the Federal statute was. He was sworn to enforce the state law, the state law was plain to him as forbidding women to display birds on their hats and, as far as he was concerned, they would not be permitted to do so.

Failing to budge his subordinate, the State Game and Fish Commissioner turned the matter over to his chief deputy, E. T. Grether. He wrote Deputy Heller a curt letter, asking for his badge, his commission and instructing him to return the birds instanter.

Heller felt that his fight would be a losing one single-handed and made public the State Game and Fish Commissioner's letter. The result was a pouring in of reinforcements. The Bird Club of St. Louis took the left wing, the Missouri Bureau of Conservation and Wild Life Protection took the right wing and the Audubon Society took its position on the center of the firing line.

The State Game and Fish Commissioner sent Chief Deputy Grether to St. Louis. Grether came down and poured a fusillade of abuse upon Deputy Heller, whereupon a half-dozen other organizations came to his support and he began to receive letters from organizations in other states to hold the fort. W. T. Hornaday, of the New York Zoo, wrote him to insist on enforcement. "The United States Millinery Chamber of Commerce is on record as opposing sale of birds of paradise and other similar plumage," he wrote. "Prosecute vigorously any violators of the Missouri law."

Deputy Heller's reinforcements sought the prosecuting attorney's office. They demanded the issuance of a warrant for the offending stores. The prosecuting attorney looked in the statute book, read the law and announced that warrants would be issued immediately.

A week passed. No warrants were issued. The prosecuting attorney was revisited. He was not so sure by now The department stores were not supinely sitting by.

The prosecuting attorney looked at Deputy Rand and looked at the list of department stores. Then he announced that no warrant would

be issued. However, he said, suavely, the department stores would be called in and he felt sure they would promise to sell no more plumes.

Thereupon the Women's Chamber of Commerce in St. Louis joined the fight and went to the prosecuting attorney. That official ponderously read the law again.

The clear intent of the law, he said, was to protect the birds of Missouri. The bird of paradise did not exist in Missouri. Ergo, the sale of birds of paradise was not to be prohibited.

"Read the law," the women said, and the prosecuting attorney read:

"No person shall within the state of Missouri kill or catch or have within his possession, living or dead, any wild bird, other than a game bird; or purchase, offer or expose for sale, transport or ship within or without the state, any such wild bird after it has been killed or caught, except as provided in this article.

"No part of the plumage, skin or body of any bird protected by this section shall be sold or had in possession for sale, irrespective of whether said bird was captured or killed within or without the state. For the purposes of this article the following shall be considered game birds: (Here followed a long list in which the bird of paradise did not appear).

"All other species of birds," the law continued, "either resident, migratory or *imported* shall be considered non-game birds. Nothing in this article shall be construed to prevent the possession of live canaries and parrots."

Deputy Heller pointed out that the statute protected the bird of paradise, a non-game bird, by its reference to "imported birds." And he explained why the United States Government could not proceed against the St. Louis shopkeepers. The Federal law affecting plumes of birds of paradise is in the tariff act of 1913, which prohibits the importation of feathers of any wild bird, and it is well known to those interested in the protection of wild life that bird of paradise plumage in this country, imported since 1913, is smuggled and that to "make a case" the Federal Goernment must prove that the feathers were smuggled, a difficult task.

"That is why the Federal Game Warden could not act and you have just learned why I could and did," Heller told the prosecuting attorney.

But that official was still dubious. "We must ask the attorney-general," he said. Now, the attorney-general of Missouri, Jesse W. Barrett is a candidate for the Republican nomination for United States Senator.

After a bit, Deputy Heller scored his first victory. The attorney-general ruled that the law meant what it said and was not to be superseded by any "office rule." The opinion was as follows:

"We are advised that ever since the passage of the Federal law upon the subject, the Missouri fish and game wardens have construed this section to permit the sale of bird of paradise plumage. This con-

struction, which has been continued through several administrations, seems to have been based upon two points: First, it has been believed that the Missouri legislature did not intend to extend its protection to any species of birds whose habitat is entirely outside the United States; secondly, it has been believed that the Federal law was paramount as far as it concerned birds imported from other countries and which might be subject to interstate commerce. Acting in this belief the Game and Fish Commissioner has notified the St. Louis merchants that no effort would be made to stop their sale of bird of paradise plumage.

"Nevertheless, the section referred to is very specific and could hardly be made more so. It prohibits the catching, killing, or possession of any birds except game birds and proceeds to define game birds by setting out a detailed list of the species included in that class. To make the classification still more specific, the act says that all species of birds, whether 'resident, migratory or imported,' shall be considered non-game birds. The bird of paradise is not listed among the game birds. The conclusion is unavoidable that the letter of the statute prohibits the possession of bird of paradise plumage.

"Whether the state has the power to enact such a law and whether it is a violation of any Federal law are questions for the defense, but need not be considered by the state at this time. We are bound to give a presumption of validity in favor of the statute and to assert the state's right until the action has been held invalid by the courts.

"It is our opinion, therefore, that the section in question prohibits the possession of bird of paradise plumage; at least the state should adopt that position until a contrary decision is rendered by a court of competent jurisdiction."

Then, addressing the prosecuting attorney, the attorney-general said: "Of course, this office is not empowered to advise you with respect to any particular prosecution, and can pass only upon the abstract question of the law. It is for you to decide whether the facts in the cases before you warrant a proceeding. If the persons involved have been acting in good faith upon the construction hitherto placed upon the law of Missouri authorities, you are, of course, reluctant to hold them criminally liable.

"I venture the suggestion that all practical purposes might be served by making one of the cases a test case under agreement with the St. Louis stores that no further sales be made until the matter is finally determined by the courts."

Again Deputy Heller and his ever-increasing cohorts visited the prosecuting attorney. That official's back was to the wall. He issued information against the five stores, but singled out only one for prosecution, that against the Kline store. The others will rest until a decision is had in the first.

Meanwhile, Deputy Heller still is without his job which he filled in his own peculiar, refreshing way for 14 years.

But he still has the bird of paradise plumes and what's more he intends to keep them. Meanwhile, no other plumes are on sale in St. Louis stores, not even the most powerful.—*Chicago Legal News.*

Obstructing the Efficiency of the Juvenile Court.—The recent decision of the Federal Supreme Court in U. S. *v.* Moreland, April 17, 1922, U. S. Adv. Op., 1921-22, p. 434, is thought by many to have created a serious obstruction to the efficiency of juvenile courts in dealing with delinquent parents. The auxiliary function of the juvenile court proceed against parents who "contribute" to their children's delinquency or dependency has long been foreseen to be the difficult legal problem of that type of court. The reason is that its methods with the juvenile himself may readily be interpreted as equitable; but its methods with the adult who "contributes" are difficult to interpret otherwise than as penal, and this would mean that all the traditional safeguards of penal proceedings must be strictly observed in measures taken against the parents.

And now comes the Federal Supreme Court to hold that an indictment by the grand jury is necessary, where a parent is sentenceable to a workhouse at hard labor, under the Juvenile Court Act. This is because the Fifth Amendment to the Federal Constitution requires grand jury proceedings for "a capital or other *infamous crime*," and because the term "infamous crime" is defined as one whose punishment includes hard labor.

1. No doubt it seems ridiculous that a penalty of imprisonment with nothing to do should not be "infamous," while an imprisonment with daily work to do should be "infamous." The net result is irrational, concretely.

But that is often the case with the law's provisions. The Federal Constitution would today prevent Alexander Hamilton from being President of the United States at the age when he was acting as its financial savior. The question cannot be tested finally by its results. But irrational results should want to make us employ other paths of reasoning if available. This, however, the Supreme Court is disinclined to do—at least six of its members; for three dissent, including the chief justice and Justice Brandeis and Holmes.

2. In the first place, the court deems itself bound by precedent. In Ex parte Wilson, 114 U. S. 417, it had decided the very point, viz., that the test of an "infamous crime" was whether it was punishable by imprisonment by hard labor, and not whether the place named is called a penitentiary or a workhouse. Just how sound in interpretation was the ruling in Ex parte Wilson is a long historical question. But three justices maintain that hard labor was not the necessary point of the opinion in Ex parte Wilson, supra, nor in its successor, Wong Wing *v.* U. S., 163 U. S., 228. In such a situation, the majority could better have regarded the question as an open one, if thus they could have avoided an irrational result.

3. If the question were an open one, the definition of "infamous" could well have been revised. It is a shifting and shifty standard, changing with public opinion, and therefore difficult to fix without leading to that uncertainty which is the bane of the law. The dissenting opinion calls attention to the irrationality of deeming "infamous" a pleasant day's outdoor work on the Occoquan farm, which constitutes the district's workhouse. But if there is to be a revision of the definition of "infamous," it would be well to reconsider entirely the federal court's interpretation of "infamous" as determinable by the nature of the *punishment* instead of the nature of the *crime*. The federal court's interpretation of the Federal Constitution differs from the Illinois court's interpretation of the Illinois constitution. The latter may have its own objections; but at any rate "infamy" is a large idea which should be reconstrued in the light of the history of the term. (And in passing, let us lament that counsel apparently failed to call to the court's attention the learned articles of the late Professor Henry Schofield on the history of that term, and its interpretation, published in V Illinois Law Review, 108 and 321, and since reprinted in his "Essays on Constitutional Law and Equity," 1922.)

4. However, it is not necessary to fear much danger to the functions of the juvenile court in subsequent interpretation by the state courts. The constitutional terms differ widely, and each phrase has its own history. The matter becomes one of statutory construction in each instance. The state courts do not have to follow the federal court any more than the Illinois court did in People *v.* Kipley, 171 Ill. 44, 170 U. S. 182, or in People *v.* Russell, commented on by Professor Schofield in the articles cited above.

5. Moreover, may it not be well to reconsider the penal methods of the juvenile court towards "contributing" parents? If the court's main function is equitable, why cannot its auxiliary functions also be organized equitably? Why not, instead of sentencing the lazy parent to a penal farm, decree him to go to work, put him under a recognizance to turn over a share of his wages to support the children, and authorize garnishee process upon his employer? To reach the obstinate idler, why not declare him to be in contempt of court for not obeying its order to work, and place him in the workhouse until he is willing to go to work?

We do not know whether this is practically likely to attain the point in all cases; experience alone could reveal this. But we do believe that it is more consonant with the "parens patriæ" spirit, which is the fundamental feature of the modern juvenile court. And we also believe that it would serve to remove, in law, the obstruction that threatens to block the expansion of juvenile court methods in their dealings with parents and other adults.

We have long believed that the juvenile court methods are destined to become, by expansion, the methods of the future in dealing with certain classes of adult delinquencies. And we have also foreseen that

the obstacle to this was sure to be in the traditional limitations of criminal procedure; for these limitations must apply in all courts, whatever their name. The only way to avoid them is to eliminate the penal features of juvenile court methods as to adults. Why not face this future aspect now? Why not harmonize the entire juvenile court practice with itself? Why not attempt to use the compulsory methods of the chancellor throughout, and thus make possible in experience the application of the methods of the juvenile court in a larger field?

John H. Wigmore,

Journal of the American Institute of Criminal Law and Criminology.

The Twenty-four New Judges.—At no time has a President faced a peace-time duty, requiring greater care, than in the practically simultaneous selections of 24 additional Federal judges. And at no time has the Senate's power of confirmation of appointments called for closer public scrutiny.

Congress would have shown wisdom if it had provided for each of the additional judgeships by separate act. Then each nomination could have been considered upon its merits. Only a few of the members of the Senate, who are charged with the duty of advising and consenting to the President's nominations, would then have been directly concerned with each nomination.

But with omnibus appointment, as with omnibus legislation, there comes inevitably the question of trading. This is said in no sense of criticism of the motives which will inspire the Senators in the confirmation of the judicial appointments. It may be granted that the members of the Senate, with almost no exception, are eager to select men of the highest qualifications for places on the bench. But the plain facts are that a Senator will be most vitally interested in the judge who will preside over his particular district. In the nature of things, the Senator's enthusiasm and interest in his particular district must detract from his attention to the qualifications of the other 23 nominations before the Senate. It may not be an actual trading of votes that will result, but the practical effect will be the same.

Nominations before the Senate should be considered on their several merits. The situation in connection with the judicial appointments precludes this possibility. There is left the opportunity of the the Senate to consider the nominations in public rather than in executive session. The executive session has been the custom. The reason assigned for this is that a man's personal affairs might be aired, without good accruing to the public. But it would seem patent that in judicial nominations at least, the man chosen for confirmation should be above the shadow of any suspicion. It would be far better that a breath of scandal should injure an innocent individual, than that by any mischance an improper selection be made for a place of such vast power.

It is a tremendous nosponsibility that lies upon the President and

the Senate. The choice of one member of the Supreme Court is frequently of a nature that precludes more than a half-dozen persons being considered. Their reputations are national, and the judgment of their qualifications is such that there is slight chance of confirming a dangerous nominee. But with sectional appointments of Federal judges, the situation is different. And in the last analysis these appointments may be considered more vital than the Supreme Court designations, because they are the judges who apply the laws the Supreme Court has interpreted; comparatively few of the cases heard before the trial judges reach the highest tribunal for review, and the litigants therefore must rely on the district court.

Public attention should be focused upon the judicial appointments. The tenure of office is for life, and the decisions of the 24 men chosen will exercise an almost incalculable influence upon the course of the Republic during the next half century. The public is entitled to know all about the nominees.—*The Dearborn Independent.*

Odoriferous Breath a Privileged Communication.—Under a ruling of the Kansas City, Mo., Court of Appeals in Owens *v.* Kansas City, C., C. & S. J. Ry. Co., 225 Southwestern Reporter, 234, a physician, who in treating a patient is made aware, because of the mellowness of his breath, of the fact that he has been indulging in the use of intoxicants, may not testify thereto, it being a privileged communication.

The action was for the wrongful death of a man killed by being knocked off a bridge during the night by an interurban electric car, and involving the application of the humanitarian doctrine.

Judge Trimble, in ruling on the admissibility of the evidence, said: "The fact that they [doctors of hospital] smelled liquor on his breath and he appeared intoxicated was clearly privileged (Kling *v.* City of Kansas, 27 Mo. App. 231, 244) unless waived, and the record does not show such waiver. In this connection it is not clear to us how the fact of the smell of liquor on his breath was relevant in a case depending wholly, as this one does, on the humanitarian doctrine."

Legally Speaking.—If a man were to give another an orange he would simply say: "I give you this orange." But when the transaction is intrusted to a lawyer to put in writing he adopts this form: "I hereby give and convey to you, all and singular, my estate and interests, right, title, claim and advantages of and in said orange, together with all its rind, juice, pulp and pips, and all rights and advantages therein, with full power to bite, cut, suck and otherwise eat the same or give the same away with or without the rind, skin, juice, pulp or pips, anything hereinbefore or hereinafter or in any other deed or deeds, instrument or instruments of whatever nature or kind whatsoever to the contrary in any wise notwithstanding."

And then another lawyer comes along and takes it away from you.—*Chicago Medical Recorder.*